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IN THE

Supreme Court of the United States

October Term, 1984

LARRY LEE GRESS,

Petitioner,

vs

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

– AND APPENDIX –

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QUESTION PRESENTED

WHETHER PETITIONER, A DEFENDANT IN A RAPE CASE, WAS DENIED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WHERE THE TRIAL COURT PROHIBITED CROSS EXAMINATION OF THE COMPLAINING WITNESS REGARDING OTHER RECENT SEXUAL LIAISON SHE MAY HAVE HAD AND WHERE THE PURPOSE OF SUCH CROSS EXAMINATION WAS TO DEMONSTRATE THAT THE SEMEN STAINS ON HER CLOTHING, INTRODUCED BY THE PROSECUTION INTO EVIDENCE, COULD HAVE BEEN DEPOSITED THERE BY A MAN OTHER THAN DEFENDANT?

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LARRY LEE GRESS,

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PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the Order of the Michigan Supreme Court, dated October 24, 1984, denying Petitioner's Application for Leave to Appeal in that Court. This subject Application for Leave to Appeal sought review by the Michigan Supreme Court of the earlier decision of the Michigan Court of Appeals affirming Petitioner's conviction on charges of third degree criminal sexual conduct and conviction as a habitual offender under the Michigan Habitual Offender Statute.

OPINIONS BELOW

The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is dated

October 24, 1984 and appears in the Appendix, p. A-1. The original Order appealed from is the Judgment of Sentence entered by the Oakland County Circuit Court on August 31, 1982; this Order appears at Appendix, pp. D-1-D-2. The Opinion of the Michigan Court of Appeals affirming the conviction is dated February 27, 1984 and appears in the Appendix, pp. C-1-C-8. A further Order of the Michigan Court of Appeals Denying Petitioner's Petition for Rehearing in the Michigan Court of Appeals was entered on April 24, 1984 and appears in the Appendix, p. B-1.

JURISDICTION

The Order of the Michigan Supreme Court, the highest Appellate Court of the State of Michigan, Denying Application for Leave to Appeal to that Court was entered on October 24, 1984. The certiorari jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) in that the validity of a statute or its application has been drawn into question on the ground of its being repugnant to the Constitution of the United States and specifically to the Sixth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This Petition concerns the application of the Sixth Amendment of the United States Constitution to the Michigan Criminal Sexual Conduct Statute. The Sixth Amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The relevant portion of the Michigan Criminal Sexual Conduct Statute for the purpose of this Petition is that portion dealing with the exclusion of certain evidence, being Mich. Comp. Laws Ann. 750.520(j), which reads as follows:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520(b) to 520(g) unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

STATEMENT OF THE CASE

This case arises out of an alleged act of criminal sexual conduct, third degree, occurring on August 6, 1981, in White Lake Township in Oakland County, Michigan. The complaining witness was fourteen (14) years old at the time.

Defendant, LARRY LEE GRESS, was arrested pursuant to a warrant issued on August 24, 1981. On September 4, 1981, Defendant was bound over for trial on the charge of third degree criminal sexual conduct, second offense, contrary to Michigan Statute, Mich. Comp. Laws Ann. 750.520(d). That Statute defines the crime as follows:

> A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is at least thirteen (13) years of age and under sixteen (16) years of age.

The Statute provides that criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than fifteen (15) years. A further Statute, Mich. Comp. Laws Ann. 750.520(f), provides for a mandatory minimum sentence of at least five (5) years for a second conviction. Additionally, Defendant was charged and convicted with being a habitual offender, third or subsequent offense under Michigan Statutes, Mich. Comp. Laws Ann. 769.12 & 769.13. For the purpose of this Petition, the significant conviction is that conviction on the charge of third degree criminal sexual conduct, since without that conviction there is no predicate offense on which to base the enhanced penalties of the second offense provisions of the Criminal Sexual Conduct Statute, nor is there a predicate for the conviction under the Habitual Offender Statute.

The Trial was held on July 26, 27 and 29, 1982. On July 30, 1982, the Jury returned a guilty verdict on the principal charge of criminal sexual conduct, third degree. On August 2, 1982, the remainder of the charges and

the information were disposed of by the entering of guilty pleas by Defendant to the second offense charge under the Criminal Sexual Conduct Statute and the habitual offender third or subsequent offense charge under the Habitual Offender Statute. These Pleas were the result of a plea bargaining arrangement in which the prosecution reduced the habitual offender charge from a fourth offense to a third offense. Defendant through its counsel stated on the record that the guilty pleas were premised merely on the admission that this conviction was a second offense of the Criminal Sexual Conduct Statute and his third felony conviction; Defendant was not admitting that he actually committed the underlying crime for which the Jury had found him guilty. This distinction was made to insure that Defendant's pleas would not be misinterpreted as admissions of guilt or a waiver of his right to appeal. The Trial Court accepted the pleas with that understanding.

At Trial, the complaining witness testified that LARRY LEE GRESS, Petitioner herein, and his son Earl came over to her house in the evening hours of August 6, 1981. The complaining witness was at home with her eight (8) year old sister; they were expecting their father to return shortly. LARRY LEE GRESS was a friend of the complaining witness' father and was a frequent visitor. On this night GRESS and his son came over to seek the help of the complaining witness' father with regard to a broken car door latch that needed welding. After the father came home, LARRY LEE GRESS' son Earl and the complaining witness' father went outside to work on the car in the driveway along side the house. LARRY LEE GRESS remained in the house, playing cards in the kitchen with the eight (8) year old sister.

At this point, according to the complaining witness, Defendant, LARRY LEE GRESS, left the kitchen to suggest

that she "meet" with him the following morning. She fended off this advance, but he returned from the kitchen a second time, this time to suggest a meeting the following Monday at which he would bring "five hundred hits of acid." After going back to the kitchen, LARRY LEE GRESS again returned to give the complaining witness a Twenty ($20.00) Dollar bill and to threaten her that if she did not meet with him across the canal, then she would have to return the Twenty ($20.00) Dollars, and, additionally, he, Defendant, would tell her father "all this stuff about her." Finally, according to the complaining witness, LARRY LEE GRESS returned to the kitchen a fourth time and told the complaining witness to take off her pants. The complaining witness went into the bathroom to comply with this request. She admitted that her father was just outside the house working on the car and that there was a window in the bathroom that opened to approximately where her father was working. Notwithstanding the fact that her father was just outside the house and that her sister was in the kitchen only a few short feet away, the complaining witness testified that she exited the bathroom and submitted to sexual intercourse with Defendant. She explained that her compliance was the result of the fear of Defendant. Nowhere did she explain, however, why she came out of that locked bathroom or without calling to her father.

Defendant's primary line of defense to this story was that it was simply incredible. There was, however, one (1) key piece of physical evidence which seemed to corroborate this testimony: The Prosecutor introduced into evidence the romper suit that the complaining witness had been wearing that night; it contained certain stains in the crotch area that were positively identified as semen stains. Although the stains were positively identified as semen stains, serological testing was unable to positively

establish that Defendant LARRY LEE GRESS was the source of the stains. Since LARRY LEE GRESS was a "non secretor," all that could be said with certainty was that he could not be eliminated as a possible source of semen. Anybody with type "O" blood could have been responsible as well as anybody who, like LARRY LEE GRESS, was a non secretor regardless of his blood type, O, A, B, or AB. This amounted to about fifty-five (55%) percent of the male population. The presence of semen stains, even if not scientifically demonstrable as originating from Defendant, did prove that the complaining witness did have sexual relations with someone. This meant necessarily that if the defense could not show an alternate source for the semen, the physical evidence could be said to conclusively establish that Defendant had sexual relations with someone; namely, the complaining witness.

Defense counsel attempted to cross examine the complaining witness regarding her relationship with her boyfriend and the possibility of sexual contact with him at, or prior to the time of the alleged rape. The Court prevented that inquiry from being made. The matter came up on two (2) occasions. The first was at a Pre-Trial Motion In Limine in which the prosecutor sought to have all inquiry into past sexual conduct barred. The Trial Court concluded (Transcript of the Trial, July 26, 1982, p. 21):

> However, with respect to the admissibility of this other evidence, this court has examined the statute, read it carefully, including sub (j) and this court is of the opinion that the whole reason for the legislature to enact the new statute was to foreclose and to proscribe going into of [*sic*] the sexual activities of the complainant except in rare situations and in a situation which comes very

> close in this case, the presence of semen, however this court is of the opinion that as enunciated and stated by the prosecuting attorney that basic fairness there again requires that they be allowed to make examination and to be able to make inquiry as to any witness that would be brought forth, so at this point, at this stage, this court is going to prohibit inquiry into her past sexual activities.

The second ruling of the Trial Court on this issue occurred in the course of cross examination of the complaining witness. After notifying the Court that counsel wished to explore the issue of an alternative explanation for the source of the semen stains, a separate record was made outside of the presence of the Jury. In that separate record, defense counsel was not allowed to explore how frequently or how near to August 6, 1981, the complaining witness had intercourse with another person. The Court permitted only the question as to whether the complaining witness had sexual relations while she was wearing the subject romper suit which had been marked as an Exhibit — to which she answered no. Defense counsel strongly objected that the single question did not allow a meaningful inquiry into the question of the source of the semen stains. For example, additional cross examination could have established a long history of sexual activity. If that history had been denied, defense counsel could have subpœnaed the complaining witness' boyfriend (whose name and address were known to defense counsel). However, because of the Court's rulings, the boyfriend was never called to testify. The Court conclusively ruled as follows (Transcript of the Trial, July 27, 1982, p. 82):

> Well, that's the point exactly, so all right, I'll deny your request to make inquiry about her having any relations with anybody.

Defense counsel again attempted to raise in final argument the issue of whether there could be another person responsible for the semen stains. Pursuant to the Prosecutor's objection, the Court interrupted defense counsel's final argument to prohibit reference to other possible sources for the semen stains. The relevant portion of the Transcript appears at pp. 116 and 117 of the proceedings of July 29, 1982, picking up with defense counsel's argument:

> This test doesn't prove anything. All it proves, I guess frankly, is that when you come right down to it that there were semen stains on this particular garment but that doesn't tell you that they came from Mr. Gress. It could have come from anybody else in that neighborhood and although we can't talk about specifics or name names, certainly that's I think the conclusion that you are free to draw.
>
> PROSECUTOR TODD: Your Honor, I am going to object to that.
>
> THE COURT: I agree. I agree.
>
> PROSECUTOR TODD: And ask that that be stricken and the jury instructed.
>
> THE COURT: I agree, that's improper. That's improper argument.
>
> DEFENSE COUNSEL MARLINGA: I'd like to make an argument off the record, Your Honor, because I think it is proper.
>
> THE COURT: Well, I've already ruled it's improper, so finish your argument.
>
> DEFENSE COUNSEL MARLINGA: If I may be heard by the side bar?
>
> THE COURT: Sure.

(Whereupon, unreported conference was had)

DEFENSE COUNSEL MARLINGA: I think all I can say on this subject in conclusion to this part of the argument is simply that when you get right down to it, the tests do not prove at all that Mr. Gress was responsible for those semen stains. And I will just leave it at that.

Petitioner contends on appeal that the restrictions on the scope of cross examination in this area of alternative sources for the semen stains was clear error — an error that was further compounded beyond repair when in the presence of the Jury the Court essentially told the Jury that they could not consider anybody other than Defendant as the source of the semen stains.

REASONS WHY THE WRIT SHOULD ISSUE

I.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW CROSS EXAMINATION OF THE COMPLAINING WITNESS REGARDING RECENT PRIOR ACTS OF SEXUAL INTERCOURSE WHEN THE PURPOSE OF SUCH CROSS EXAMINATION WAS TO INQUIRE AS TO THE SOURCE OF SEMEN STAINS FOUND ON THE COMPLAINING WITNESS' CLOTHING.

This Appeal concerns the application and interpretation of Mich. Comp. Laws Ann. 750.520(j) and its repugnance to the right of confrontation of witnesses guaranteed to all accused persons by the Sixth Amendment of the United States. The relevant portions of the Michigan Statute reads as follows:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's

> sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520(b) to 520(g) unless and only to the extent that the Judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The enactment of this section represented a welcome and necessary advancement in jurisprudence. It recognized that complaining witnesses in rape cases were often the target of degrading attacks in cross examination regarding their previous sexual experiences, when those previous experiences bore no real relevance to the question of whether they were victims of rape on the occasion in issue. (*See* 23 Wayne L. Rev. 203 (1976) and 21 Wayne L. Rev. 437 (1975)). While prohibiting inquiry into clearly irrelevant and needlessly embarrassing areas, the statute did recognize that in certain instances evidence of prior sexual acts engaged in by the complaining witness could be relevant. Specifically, the statute permitted evidence of, or inquiry into, "specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." (Mich. Comp. Laws Ann. 750. 520(j)). In this case, the Trial Court misapplied the Statute in prohibiting reasonable cross examination of the complaining witness, where the purpose of the cross examination was to try to identify another person as the source of the semen stains on her clothing. In making this ruling, the Court either misapplied the Statute in derogation of Defendant's rights under the Sixth Amend-

ment, or if the Statute was directly applied under Michigan Law, then the entire Statute is constitutionally infirm, as being violative of the Sixth Amendment.

In this case, cross examination of the complaining witness was the only tool available to the defense to show that the semen stains on the complaining witness' romper suit could have been placed there as a result of a previous sexual encounter with another man. This alternate explanation was especially necessary to the defense, since the prosecution had introduced evidence of a physical condition, namely the semen stains, as corroborative of the complaining witness' testimony. With that physical evidence before the Jury, and with Defendant not being allowed to cross examine the witness on other possible sources for the semen stains, the final verdict of the Jury was preordained by the Court.

In *Davis* v. *Alaska*, 415 U.S. 308 (1974) and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973) this Court recognized that if meaningful cross examination of a prosecution witness is legislatively or judicially restricted, the result is an unconstitutional impairment of the defendant's rights to due process and a fair trial. In *Davis*, *supra*, the prosecution moved for a protective order to prevent any reference in the cross examination to the juvenile record of a crucial prosecution witness. The defense, in opposition to the motion, indicated that it would seek to show that since the witness was on probation by order of a juvenile court, he might be subject to undue pressure from the police. The Trial Court, relying on Alaska's Statute protecting the anonymity of juvenile offenders, granted the prosecution's motion. On certiorari, this Court held that the Sixth Amendment right to confront witnesses required that a Defendant in a state criminal case be allowed to impeach the credibility of a prosecution witness by cross examination directed at possible

bias and derived from the witness' probationary status as a juvenile delinquent, notwithstanding that such impeachment would conflict with the state's asserted interest in preserving the confidentiality of persons in the juvenile system.

Similarly in *Chambers, supra,* the defendant sought to cross examine a witness whose testimony had unexpectedly implicated him in the crime, but was prevented from doing so by the application of a Mississippi Statute prohibiting a party from impeaching his own witness. On certiorari, this Court held that State procedural rule, although justifiable in most circumstances, violated the Sixth Amendment's guarantee of the right to confront witnesses and resulted in a fundamentally unfair trial.

In this case, the State's interest in protecting complaining witnesses from undue embarrassment on the witness stand, although laudable in most instances, must yield to the higher interest expressed in the Sixth Amendment of guaranteeing the accused a right to confront the witness against him. The Michigan Statute is similar to other statutes which have been enacted in the several states, and this case offers this Court a proper opportunity in a compelling case to reverse a serious injustice and to harmonize the Michigan Statute and those of other states with the mandate of the Sixth Amendment.

CONCLUSION AND PRAYER FOR RELIEF

In view of the foregoing, Petitioner prays this Court to issue its Writ of Certiorari to the Michigan Supreme Court in order to review its Order Denying Application for Leave to Appeal, which thereby affirmed the Michigan Court of Appeals' affirming of Petitioner's conviction.

RESPECTFULLY SUBMITTED,

BUSHNELL, GAGE, DOCTOROFF & REIZEN

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DATED: January 18, 1985

APPENDIX TO PETITION FOR CERTIORARI

• • •

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Dated October 24, 1984)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LARRY LEE GRESS, Defendant-Appellant — SC: 74194; COA: 67648; LC: 81-50280 FY)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of October in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: G. MENNEN WILLIAMS, Chief Justice; THOMAS GILES KAVANAGH, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

(Certification Omitted)

B-1

ORDER

(State of Michigan — Court of Appeals)

(Dated April 24, 1984)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LARRY LEE GRESS, Defendant-Appellant — Docket No. 67648; L.C. No.: 81-50280-FY)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the twenty-fourth day of April in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: WALTER P. CYNAR, Presiding Judge; WILLIAM R. BEASLEY, TYRONE GILLESPIE, Judges.

In this cause an application for rehearing of this Court's opinion released February 27, 1984, is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED.

(*Certification Omitted*)

C-1

OPINION AFFIRMING CONVICTION

(State of Michigan — Court of Appeals)

(Dated February 27, 1984)

(THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LARRY LEE GRESS, Defendant-Appellant — No. 67648)

Before: Walter P. Cynar, PJ;
and W. R. Beasley and Tyrone Gillespie*, JJ.

Per Curiam.

Defendant, Larry Lee Gress, was convicted following a jury trial in July 1982 of criminal sexual conduct in the third degree. The offense was committed on the 14 year old daughter of a family friend on August 6, 1981.

After conviction the defendant without admitting the underlying offense plead guilty to criminal sexual conduct second offense, MCL 750.520F; MSA 28.788(6), and to being a third time habitual offender, MCL 69.12 [*sic*]; MSA 28.1084. He was sentenced to 10 to 15 years for the criminal sexual conduct and a concurrent term of 12½ to 30 years under the habitual criminal statute.

The testimony of the complainant was that about 9:30 p.m. on August 6th, she was waiting at home for her father to return from work. With her was her 10 year old sister. The defendant, who was well-known to them, and his 21 year old son, Earl, came to the complainant's home to seek the help of her father to weld a broken car

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* Circuit Judge, sitting on the Court of Appeals by assignment.

door latch on Earl's car. The complainant testified that it appeared that the defendant had been drinking.

After a short while the defendant asked the complainant to go out with him. She refused, saying that she had been "grounded." Defendant at that point threatened her that if she did not go out with him everything would "come down" on her and that "different people around the subdivision would say you've been sleeping with guys" and buying drugs from them. Defendant promised her "acid, drugs, money, a way out of the city." He told her to meet him in the backyard in twenty minutes.

Complainant's father then came home and went into the backyard to work on Earl's car. Earl was with him.

The complainant stayed in the living room watching television and the younger sister and the defendant played cards in the kitchen. The defendant made several trips into the living room to talk to the complainant. On one trip he promised her 500 hits of acid if she would meet him across the canal from his home the next Monday. On another of these trips he gave her twenty dollars but told her that if she did not go with him he would take the money back and tell her father some bad things about her.

On his fourth trip in to talk to complainant, he ordered her to go in the bathroom and take off her underpants which she was wearing beneath her pajama rompers. She finally complied because he was drunk and she did not know what he was going to do. She did remove the underpants, but left the pajamas on. When she came out of the bathroom, the defendant had her lie down in the hall. He then had intercourse with her for three to five minutes. He accomplished this without removal of the rompers by going in around the loose

fitting edge of her pajama shorts. After defendant had finished, he told her she still owed him five more minutes and that she should meet him on Monday. After the incident, the complainant went back to the living room and continued watching television. She did not tell anyone of the incident that night but the next day she told a friend who reported the matter to the police.

Complainant gave the police the pajama rompers she was wearing on the night of August 6th. A test at the state police crime laboratory determined that there were semen stains on the rompers, but while the stains were compatible with the defendant's type, still 55% of the male population would fall within that type.

During cross examination, defense counsel sought to inquire into any other sexual activity of the complainant to find any other source of the semen. The court denied him the right to do so except on special record, where counsel was permitted to inquire if she had at any time had sexual activity wearing the rompers she was wearing the night of August 6th, which she denied.

The defense appeals on the basis that cross examination should have been allowed on the other possible sources of the semen and further that the court forbade argument to the jury by limiting counsel from arguing that the semen could have come from "anyone else in the neighborhood."

This case must be decided upon the legislature's limitations on the admissibility of evidence in criminal sexual conduct cases, also known as the rape shield statute, MCL 750.520j; MSA 28.788(10), which provides:

> "750.520j Admissibility of evidence
>
> "Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence

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of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be permitted under sections 520b and 520g[1] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

"(a) Evidence of the victim's past sexual conduct with the actor.

"(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

To like effect is MRE 404 adopted by the Michigan Supreme Court in 1978 which provides in pertinent part as follows:

"Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT: EXCEPTIONS: OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not

> admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) . . .
>
> (2) . . .
>
> (3) Character of victim of sexual conduct crime. In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;"

The defendant maintains that the court erred in refusing to allow defense counsel to cross examine the complainant concerning prior sexual acts to determine the source of semen stains on her pajamas.

This Court has held that in cross examination of complainants concerning prior sexual activity the scope of cross examination is within the sound discretion of the trial court and not to be disturbed unless such discretion is abused. *People* v *Whitfield*, 58 Mich App 586, 591; 228 NW2d 475 (1975).

In discussion of the rape-shield law, the Michigan Supreme Court in *People* v *Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982) set forth the intent of the law in the following language:

> "The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons other than defendant. Although such evidence was admissible at common law in relation to certain issues, this practice has repeatedly been drawn into question. The courts, with increasing frequency, have recognized the minimal relevance of this

evidence, see Anno: *Modern status of admissibility in forcible rape prosecution, of complainant's prior sexual acts or general reputation for unchastity*, 90 ALR3d 1300, and Anno: *Modern status of admissibility in forcible rape prosecution, of complainant's prior sexual acts*, 94 ALR3d 257.

"The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant. This determination does not lack a rational basis and is not unreasonable. In fact, it is consistent with the results reached by the judiciary in resolving this issue, see *State ex rel Pope* v *Mohave Superior Court*, 113 Ariz 22; 545 P2d 946 (1976).

"The prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. Avoidance of these dangers is a legitimate interest in the criminal trial process, see MRE 403. The prohibition indirectly furthers the same interests by removing unnecessary deterrents to the reporting and prosecution of crimes.

"At the same time, the prohibitions protect legitimate expectations of privacy. Although this interest may not be as compelling as those mentioned above, it is entitled to consideration, see *Branzburg* v *Hayes*, 408 US 665; 92 S Ct 2646; 33 L Ed 2d 626 (1972)."

The crime laboratory reported finding seminal stains on complainant's pajamas. None were reported found on the underpants that complainant testified she had removed at defendant's insistence.

The court allowed defense counsel to cross examine the complainant on a separate record outside the presence of the jury.

The first question asked by defense counsel of the complainant on the separate record was ". . . This incident on August 6th, if it did happen the way you said, that wasn't the first time you had sexual intercourse with anybody, correct?"

Obviously, this question was exactly the kind of cross examination which the statute seeks to avoid. The court properly refused to allow that question and restricted counsel to questions about whether complainant at any other time had sexual intercourse while wearing the clothing she was wearing the evening of August 6th to which complainant replied negatively. Counsel sought then to ask questions about sexual relations the complainant may have had in the two or three weeks prior to August 6th. The court replied, "Well, why don't you ask her that if she has ever had it (sexual relations) wearing exhibit one or two." Counsel did not follow up on that invitation, nor did he attempt to ask if any sexual encounters occurred after the garments were laundered, or whether she had worn the pajamas outside the home or who else might have been present on August 6 in the home during the day or evening.

It is clear that the purpose of seeking to cross examine the complainant as to her prior sexual relations would be to make the complainant out as a sexually active person, which would be more prejudicial than probative as to her credibility.

No offer of proof of relevant evidence was made which was denied by the court. MRE 103(a)(2), *Grondziak* v *Grondziak*, 383 Mich 543, 547; 117 NW2d 157 (1970).

The court did not abuse its discretion by restricting the cross examination to such events as would have disclosed other sources of semen on complainant's clothing worn on the evening of August 6th.

As to the second claimed error, the defendant's counsel made the following argument in closing:

> "This test doesn't prove anything. All it proves, I guess frankly, is that when you come right down to it that there were semen stains on this particular garment but that doesn't tell you that they came from Mr. Gress. It could have come from anybody else in that neighborhood and although we can't talk about specifics or name names, certainly that's I think the conclusion that you are free to draw."

The court agreed with the prosecution, upon objection, that this argument was improper as there was no evidence to support that the stains could have come from "anybody else in the neighborhood." The defense counsel was allowed to argue that the serological tests performed by the crime lab were not conclusive as to the source being the defendant and that a majority of men in the United States could have been the contributor of the stain.

Again the court did not abuse its discretion in restricting such statement. MCL 768.29; MSA 28.1052.

Affirmed.

/s/ W. P. Cynar
/s/ W. R. Beasley
/s/ T. Gillespie

D-1

JUDGMENT OF SENTENCE

(State of Michigan — Circuit Court —
County of Oakland)

(Dated August 31, 1982)

(PEOPLE OF THE STATE OF MICHIGAN v. *LARRY L. GRESS* — NO. *CR 81-50280-FY*)

At a session of said Court held on *August 31, 1982*

PRESENT: HONORABLE *GEORGE LaPLATA,*
CIRCUIT JUDGE

Larry L. Gress, (age *40* years), the defendant herein being represented by counsel, having on the *30th day of July,* 1982, (been convicted by the Jury of) the crime of: *COUNT I: THIRD DEGREE CRIMINAL SEXUAL CONDUCT HABITUAL OFFENDER – THIRD OFFENSE –* (Plea)

It is the judgment of the Court that Defendant is sentenced to the custody of the Michigan Department of Corrections for the minimum and maximum term of years, with credit granted pursuant to P.A. 73, 1965, and sentence beginning as stated below:

SENTENCE

1. Sentence Date: *8-31-82;* Convicted By Plea, Court, Jury: *Jury;* Crime: *Count I: Third Degree Criminal Sexual Conduct;* C.L. 1948 Sec. or M.S.A. Sec.: *750.529d(1)(2)*
2. Sentence Date: *8-31-82;* Convicted By Plea, Court, Jury: *Plea;* Crime: *Habitual Offender — Third Offense;* C.L. 1948 Sec. or M.S.A. Sec.: *769.12*

1. Terms of Sentence: Minimum Yrs.: *10;* Maximum Yrs.: *15;* Sentence to Begin on (Date): *8-31-82;* Jail Credit Granted: *83 Days*

2. Terms of Sentence: Minimum Yrs.: *12½*; Maximum Yrs.: *30*; Sentence to Begin on (Date): *8-31-82*; Jail Credit Granted: *83 Days*

Other Information: *These sentences are to run concurrent with each other (Counts I & II)*

OFFICIALS

JUDGE: *GEORGE LaPLATA;*
1200 N. Telegraph, Pontiac, MI 48053
PROSECUTING ATTORNEY: *Joyce Todd;*
1200 N. Telegraph, Pontiac, MI 48053
ATTORNEY FOR DEFENDANT: *Carl J. Marlinga;*
3000 Town Center, Suite 1500, Southfield, MI 48075

Therefore, it is adjudged that the above sentence be immediately executed.

/s/ *GEORGE LaPLATA,*
CIRCUIT JUDGE

(Certification Omitted)

Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1172

IN THE

Supreme Court of the United States

October Term, 1984

LARRY LEE GRESS,

Petitioner,

vs

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED FOR FAILURE TO FILE SAME WITHIN THE TIME PERIOD PROVIDED BY SUPREME COURT RULE 20.1?

II.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION, OR DENIED THE PETITIONER HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION, BY LIMITING THE CROSS-EXAMINATION OF THE COMPLAINING WITNESS WITH REGARD TO PRIOR SEXUAL ACTIVITIES WITH THIRD PARTIES?

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No. 84-1172

IN THE

Supreme Court of the United States

October Term, 1984

LARRY LEE GRESS,

Petitioner,

vs

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

As Petitioner has noted, his petition for Writ of Certiorari concerns the application of the Sixth Amendment of the United States Constitution to the Michigan "rape-shield" statute, MCLA 750.520j; MSA 28.788(10). MCLA 750.520j, in its entirety, provides as follows:

> Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the

following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MCLA 750.520j was added to the Michigan Penal Code by 1974 PA No. 266, § 1.

STATEMENT OF THE CASE

The account of the trial proceedings set forth in Petitioner's statement of the case is essentially correct. Rather than re-state what Petitioner's counsel has written, the Respondent shall simply mention a few additional facts and circumstances which are pertinent to the issues raised in the petition.

As Petitioner has noted, the prosecution's case was presented primarily through the testimony of Irene Johnson, the complaining witness. The account of her testimony set forth in Petitioner's statement of the case is also essentially correct. However, for clarification, the Respondent would note that Ms. Johnson testified that she was wearing a pair of pajamas when the Petitioner came to her home on the evening of August 6, 1981. (Trial Record, hereinafter T, 7/27/82, 7-8) Those pajamas were identified at trial by Ms. Johnson (T, 7/27/82, 33), and were admitted into evidence as People's Exhibit One. (T, 7/29/82, 23) Ms. Johnson testified that the fourth time that Petitioner came out of the kitchen to meet with her, he told her to go into the bathroom and take off her pants. After Petitioner had repeated this request approximately three times, Ms. Johnson went into the bathroom and removed her panties. (T, 7/27/82, 23-24) Ms. Johnson stated that she then left the bathroom and lay down in the hallway at Petitioner's request. She stated that she complied with this request because Petitioner seemed drunk and she did not know what he was going to do. (T, 7/27/82, 25-26) Ms. Johnson testified that after she lay down in the hallway, Petitioner unzipped his pants and inserted his penis into her vagina around the loose-fitting edge of her pajama shorts. (T, 7/27/82, 26) The pajamas were given to the police on the following day when the incident was reported. (T, 7/27/82, 31, 133)

The prosecution also presented the testimony of Tabatha Johnson, the younger sister of the complainant, and Thomas Johnson, their father. Although neither of these individuals had witnessed the sexual act, their testimony corroborated a number of details of the account given by the complaining witness. Both identified the pajamas which had been worn by Irene Johnson on the evening in question. (T, 7/27/82, 102, 114)

Tabatha Johnson testified that she and Petitioner played cards in the kitchen while her father was outside welding with Petitioner's son. She testified that Petitioner left the kitchen a few times to go to the bathroom during that time and that he was gone for about five minutes each time. She stated that her father was probably outside working for a little bit more than a half hour. (T, 7/27/82, 95-100) Thomas Johnson testified that he had been outside of the house working with Petitioner's son for at least forty-five minutes. (T, 7/27/82, 120)

As the Petitioner has noted, the pajamas which had been given to the police by the complainant were examined by Charlotte Day, a forensic scientist at the Michigan State Police Northville crime laboratory. Petitioner has correctly summarized the testimony of Ms. Day concerning the semen stains found on the pajamas.

Following arraignment in circuit court, Petitioner's newly-retained counsel brought a motion to remand to the district court for a continuation of the preliminary examination. One of the reasons stated in the motion to remand was Petitioner's desire to cross-examine the complainant with regard to other acts of sexual intercourse that she may have had at or about the time of the alleged incident. Petitioner's motion for remand was heard by the trial court and denied on January 13, 1982. Petitioner's counsel did not, at any time, file a written motion or offer of proof pursuant to MCLA 750.520j, concerning any proposed evidence of specific instances of the complainant's sexual conduct.

Prior to trial, the prosecutor brought a motion in limine to suppress evidence of any prior sexual conduct involving the complaining witness. The motion further requested that the court hold an *in camera* hearing pursuant to MCLA 750.520j(2), to determine the admissibility of any such evidence which might be discovered

during the course of the trial. The motion was argued before the court on July 26, 1982, the first day of trial, prior to jury selection. After hearing arguments of counsel, the court ruled that inquiring into the complainant's past sexual activities would be prohibited. In so ruling, the court indicated its agreement with the prosecutor's position that basic fairness requires that the defense give prior notice of the intention to present any such proposed evidence. The court indicated, however, that a hearing would be held out of the presence of the jury if the issue were to be brought up again during the trial:

> However, with respect to the admissibility of this other evidence, this court has examined the statute, read it carefully, including sub (j) and this court is of the opinion that the whole reason for the legislature to enact the new statute was to foreclose and to proscribe going into of the sexual activities of the complainant except in rare situations and in a situation which comes very close in this case, the presence of semen, however this court is of the opinion that as enunciated and stated by the prosecuting attorney that basic fairness there again requires that they be allowed to make examination and to be able to make inquiry as to any witness that would be brought forth, so at this point, at this stage, this court is going to prohibit inquiry into her past sexual activities. But we'll permit inquiry as to the possibility of purchase of narcotics or use of that pipe.
>
> MR. MARLINGA: I would just like to ask the court, I understand your ruling, but it may come up at some point in the testimony and I'd like a side bar conference.
>
> THE COURT: Sure, we'll do that.

MR. MARLINGA: Because I think it would be clear why it is that I can ask the question.

THE COURT: All right, we'll do that too. We'll go on a separate record and excuse the jury.

(T, 7/26/82, 21-22)

The question of prior sexual activities did arise again during the cross-examination of the complainant. The matter was discussed out of the presence of the jury and it was determined that the complainant would be cross-examined on a separate record with regard to her prior sexual activities which might have been a source of the semen stains found on her pajamas. (T, 7/27/82, 74-75)

On the separate record, Petitioner's counsel asked the complainant if she had previously had sexual intercourse with anybody prior to the incident of August 6, 1981. The prosecutor objected, stating that the inquiry should be limited to whether or not she had had sexual intercourse in the pajamas which had been identified and marked as Exhibit One. The court agreed. (T, 7/27/82, 76) Petitioner's counsel then asked the following question:

Q While you were wearing exhibit number one, o.k., on some previous occasion prior to August 6th, 1981, did you have sexual relations with a man?

The complainant responded, "Nope."

(T, 7/27/82, 77)

After hearing arguments of counsel, the court ruled that the complainant's negative response to the above-mentioned question foreclosed further inquiry into her prior sexual activities:

THE COURT: Well, Mr. Marlinga, I heard her answer and she testified that she had not had

> sexual intercourse with anybody wearing those pajamas, I think that forecloses any further inquiry. I think you've got an interesting argument and I suppose that there could be situations arise where what you've argued would require a court to permit that kind of inquiry but I think once she said and she has testified under oath that she never had relations with anybody wearing exhibits one and two, that forecloses any further discussion on that and as I indicated and am I correct in this, Mrs. Todd, there's not going to be an identification of the defendant with respect to anything they found on the exhibit anyway, is there?
>
> MRS. TODD: No, as far as being this defendant, no.
>
> THE COURT: Well, that's the point exactly, so all right, I'll deny your request to make inquiry about her having any relations with anybody.
>
> (T, 7/27/82, 81-82)

As Petitioner has noted, the court limited the closing argument of Petitioner's counsel concerning other possible sources of the semen found on the complainant's pajamas. The Petitioner has reproduced a portion of pages 116 and 117 of the transcript of July 29, 1982. The Respondent wishes to note that the argument of Petitioner's counsel concerning the semen stain and the objection thereto covers pages 113 through 117 of that transcript. The Respondent suggests that this portion of the record should be considered in its entirety:

> Then we come to the big testimony, the expert witness who I'm sure you thought was going to close the books on this case with some very convincing testimony linking Mr. Gress, either

directly or narrowing it down so much that the range of possibilities that it could be somebody else would be so small that you would be left with the impression, well it had to be Larry Gress but what did she tell you? You know, she told you that first of all in the stained area on the jump suit, she found some stuff which she called the H factor in the semen stain. She said the H factor is identified as one of the factors and it's the identifying factor in Type O blood. She then said that Irene Johnson had Type O blood. She then said that Mr. Gress had Type A blood but then she made the statement but even though he has different blood, it doesn't mean that you can eliminate him. Well, that's well and good but that's what we're supposed to be about. We're supposed to be about proving that it was him, not that you could not totally eliminate him. What did she say? She said, well when you find somebody that has — who is not a secretor and has Type A blood, you might end up with a stain that has in it this dominant H factor that would be identified with Type O blood because when you have a Type O secretor that factor will come through and when you have a Type A non secretor that factor will still remain. But then when I asked her what does this actually mean in terms of the possibilities of who could have been responsible for that sperm stain, well she said, her conclusion is that because there was this H factor left behind, that the sperm stain could have been contributed by any male with Type O blood who was either a secretor or a non secretor. If he were a non secretor, he wouldn't leave any additional H factor than what was left by the female already. If he were a secretor, his H factor would

look the same as the female's H factor and you'd still be left with the same findings.

Then she also said that it could have also been produced by any male who was a non secretor because then the only thing that would be left would be the H factor from the female and there would be no additional factor supplied by the male. Then when you narrow that down into the possible range of possibilities of who that could be, she admitted first of all, well it certainly doesn't prove it was Mr. Gress. As a matter of fact, it could be as far as number one over here, a male with Type O blood who's either a secretor or a non secretor. That's forty-four percent of the adult population in the United States, presumably North America and the World. Or it could be any male with any other blood type who's a non secretor and twenty percent of the males in the United States are non secretors, so that when you end up adding these factors together, it's more than fifty percent. In other words, a majority of the people — a majority of the men in the United States could have been the contributors to this particular stain on this garment.

Now, you're left with the conclusion that this could have been any one of a couple million people or fifty-two percent of the adult population. I don't think that's narrowed it down to the point where you can say this is proof beyond reasonable doubt. It's really ludicrous. Of course it's just the opposite. I think that this then shows that we don't have a proof situation here, that we really have a wide open situation. This test doesn't prove anything. All it proves, I guess frankly, is that when you come right down to it

that there were semen stains on this particular garment but that doesn't tell you that they came from Mr. Gress. It could have come from anybody else in that neighborhood and although we can't talk about specifics or name names, certainly that's I think the conclusion that you are free to draw.

MRS. TODD: Your Honor, I am going to object to that.

THE COURT: I agree. I agree.

MRS. TODD: And ask that that be stricken and the jury instructed.

THE COURT: I agree, that's improper. That's improper argument.

MR. MARLINGA: I'd like to make an argument off the record, Your Honor, because I think it is proper.

THE COURT: Well, I've already ruled it's improper, so finish your argument.

MR. MARLINGA: If I may be heard by the side bar?

THE COURT: Sure.

(Whereupon, unreported conference was had)

MR. MARLINGA: I think all I can say on this subject in conclusion to this part of the argument is simply that when you get right down to it, the tests do not prove at all that Mr. Gress was responsible for those semen stains. And I will just leave it at that.

(T, 7/29/82, 113-117)

Petitioner's conviction was affirmed by the Michigan Court of Appeals in an unpublished opinion on February 27, 1984. A timely application for rehearing was subsequently filed and was denied by the Court of Appeals on April 24, 1984. Petitioner's counsel subsequently filed a timely application for leave to appeal in the Michigan Supreme Court. That application for leave to appeal was denied by the Michigan Supreme Court in an order issued on October 24, 1984.

A petition for Writ of Certiorari was filed by Petitioner's counsel in this Court on or about January 18, 1985, without having obtained or applied for an extension of time for filing same.

SUMMARY OF ARGUMENT

I.

Petitioner has filed his petition for Writ of Certiorari after the expiration of the sixty day time period provided by Supreme Court Rule 20.1, without having explained the delay, and without having obtained or applied for an extension of time in accordance with the Court's rules. Under these circumstances, the Respondent submits that waiver of the time requirement provided by Rule 20.1 would be inappropriate, and that the petition for Writ of Certiorari filed herein should, therefore, be denied for failure to file same within the sixty day time period provided by Rule 20.1.

II.

The trial court did not abuse its discretion or deny Petitioner his Sixth Amendment right of confrontation by limiting the cross-examination of the complaining witness with regard to her prior sexual activities with

third parties. The Michigan rape-shield statute, which is consistent with similar provisions enacted by the federal government and by several other states, is not invalid as violative of the Sixth Amendment right of confrontation, either on its face, or as applied to the case at bar. The trial court properly exercised its discretion to limit the scope of cross-examination to matters relevant to the question of whether there might have been an alternative source for the semen stain found on the complainant's pajamas.

ARGUMENT

I.

THE WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED FOR FAILURE TO FILE SAME WITHIN THE TIME PERIOD PROVIDED BY SUPREME COURT RULE 20.1.

In the case at bar, the order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was issued on October 24, 1984. Petitioner subsequently filed a Petition for Writ of Certiorari in this Court on or about January 18, 1985. The Respondent suggests, at the outset, that the petition for Writ of Certiorari should be denied for failure to file same within the time period provided by Supreme Court Rule 20.1.

Rule 20.1 provides that a petition for Writ of Certiorari to review the judgment in a criminal case of a state court of last resort or of a federal Court of Appeals shall be deemed in time when it is filed with the Clerk within sixty (60) days after the entry of such judgment. Rule 20.3 provides that the Clerk will refuse to receive any petition for Writ of Certiorari which is jurisdictionally out of time.

Decisions of this Court which have interpreted the former Rule 22, the predecessor to the current Rule 20, have held that the time limitation contained therein for filing of a petition for Writ of Certiorari was not jurisdictional, and could be relaxed by the Court, in the exercise of its discretion, when the ends of justice so required. Thus, in certain cases where the Petitioner has shown good cause for a delay in filing, it has been found that waiver of the rule's time requirements was appropriate. *Durham* v *United States*, 401 US 481, 91 S Ct 858, 28 L Ed 2d 200 (1971); *Schacht* v *United States*, 398 US 58, 90 S Ct 1555, 26 L Ed 2d 44 (1970); *Taglianetti* v *United States*, 394 US 316, 89 S Ct 1099, 22 L Ed 2d 302 (1969); *Heflin* v *United States*, 358 US 415, 79 S Ct 451, 3 L Ed 2d 407 (1959). It has been noted, however, that the court's procedural requirements are essential to an orderly appellate process, and that the court's discretion to permit a waiver of those requirements should therefore be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with the rules. *Schacht* v *United States, supra.* (Justice Harlan, concurring).

In the present case, the petition for Writ of Certiorari was filed nearly a month after the expiration of the sixty day time period provided by Rule 20.1. Petitioner did not obtain or apply for an extension of time for filing his petition in accordance with the Court's rules. Nor has he offered any explanation to the Court for the delay, or shown any extenuating circumstances such as those which were found in the above-cited cases. Under these circumstances, the Respondent submits that waiver of the time requirement provided by Rule 20.1 is not appropriate. Accordingly, the Respondent respectfully suggests that the petition for Writ of Certiorari filed herein should be denied for failure to file same within the time period provided by Rule 20.1.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR DENY THE PETITIONER HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION BY LIMITING THE CROSS-EXAMINATION OF THE COMPLAINING WITNESS WITH REGARD TO PRIOR SEXUAL ACTIVITIES WITH THIRD PARTIES.

As is noted above, the trial court limited Petitioner's cross-examination of the complaining witness with regard to her prior sexual activities with third parties, pursuant to the Michigan rape-shield statute, MCLA 750.520j. In accordance with the requirements of MCLA 750.520j(2), the complaining witness was questioned out of the presence of the jury on a separate record with regard to her prior sexual relations. As Petitioner has noted, this was done in order to determine whether there might have been an alternative source of the semen stain which was found on the complainant's pajamas. To this end, Petitioner's counsel asked the complainant whether she had engaged in sexual relations with a man on some occasion prior to August 6, 1981, while wearing the pajamas which had been marked as People's Exhibit Number One. The trial court ruled that the negative response to that inquiry precluded further questioning as to the complainant's sexual conduct.

In his petition for Writ of Certiorari, the Petitioner has claimed that this limitation upon the cross-examination of the complaining witness impermissibly infringed upon his Sixth Amendment right of confrontation, and that the Michigan rape-shield statute is, therefore, unconstitutional, either on it's face, or as applied in this case. The Respondent contends, for the reasons set forth

below, that the rape-shield statute does not violate the Sixth Amendment right of confrontation, and that the trial court properly exercised its discretion to limit the cross-examination of the complainant in order to prevent an unwarranted inquiry into irrelevant matters.

MCLA 750.520j provides in pertinent part as follows:

> Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Under the statute, only specific instances of sexual activity are admissible to show an alternative source or origin of semen, pregnancy or disease. Even such evidence of specific instances of sexual activity is admissible only to the extent that the trial judge finds that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

As Petitioner has noted, the rape-shield statute promotes a number of important public interests. In *People* v *Arenda*, 416 Mich 1 (1982), the Michigan Supreme Court discussed those public interests as follows:

The rape-shield law is one part of a relatively recent revision of our penal laws relating to sexual conduct, 1974 PA 266. This revision was a reflection of a nationwide concern about the prosecution of sexual conduct cases. The law is similar to provisions recently enacted by many other states and by the federal government. In *People* v *Khan*, 80 Mich App 605, 613-614; 264 NW2d 360 (1978), the Court of Appeals discussed the public policies underlying the law, stating:

> "Returning to MCL 750.520j(1); MSA 28.788(10)(1), we observe that this provision — an integral part of Michigan's criminal sexual conduct act — represents an explicit legislative decision to eliminate trial practices under former law which had effectually frustrated society's vital interests in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
>
> * * *
>
> "'Primarily, * * * [rape-shield statutes] serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment. In line with these goals, they encourage the victim to report the assault and assist in

> bringing the offender to justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government's aim of deterring would-be rapists as well as its interest in going after actual suspects. These statutes are also intended, however, to bar evidence that may distract and inflame jurors and is of only arguable probative worth. To the degree that they aid in achieving just convictions and preventing acquittals based on prejudice, they naturally further the truth-determining function of trials in addition to more collateral ends.'"

416 Mich 1, 8-10.

Recognizing the great importance of these public policies, the Michigan appellate courts have upheld MCLA 750.520j against constitutional attack in a number of cases. *See*: *e.g.*, *People* v *Williams*, 416 Mich 25 (1982); *People* v *Arenda*, *supra*; *People* v *LaPorte*, 103 Mich App 444 (1981).[1] The decisions upholding the validity of the statute include a number of cases in which the trial court limited cross-examination of the complaining witness. *People* v *Rojem*, 99 Mich App 452 (1980); *People* v *Dawsey*, 76 Mich App 741 (1977); *People* v *Whitfield*, 58 Mich App 585 (1975). *See also*: *People* v *Smith*, 128 Mich App 361 (1983); *People* v *Stull*, 127 Mich App 14 (1983).

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[1] MCLA 750.520j is similar to rape-shield statutes which have been enacted by a number of other states. Those statutes have also been generally upheld against Sixth Amendment claims. *See Generally*: *People* v *Arenda*, *supra*, fn7; Annotation: *Constitutionality of "Rape-Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 ALR 4th 283 (1980).

The Michigan Supreme Court has again upheld the rape-shield statute in the consolidated cases of *People* v *Hackett* and *People* v *Paquette*, ___ Mich ___ (Released 2/1/85). In those cases, the Court reaffirmed it's earlier decision in *People* v *Arenda, supra*, which upheld the rape-shield statute against a claim that it violated the Sixth Amendment right of confrontation. In addition, the Court recognized that evidence of the complainant's sexual conduct may be admitted for purposes other than those enumerated in the statute when the admission of such evidence is required to preserve a defendant's constitutional right to confrontation. (Slip Opinion, pp 3-5)[2]

The above-cited authorities clearly demonstrate that MCLA 750.520j does not infringe upon the Sixth Amendment right of confrontation. The statute specifically provides for the admission of evidence of a complainant's sexual conduct for the purposes for which it has generally been deemed to be relevant. In addition, the statute has been interpreted by the Michigan Supreme Court to allow for the admission of other evidence of the complainant's sexual conduct to the extent that the admission of such evidence is required to preserve the defendant's right of confrontation. Therefore, it cannot be concluded that the Michigan rape-shield statute is facially invalid as violative of the Sixth Amendment right of confrontation.

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[2] This interpretation of the Michigan rape-shield statute is consistent with Federal Rule of Evidence 412(b)(1), which provides for admission of evidence of a victim's past sexual behavior when the admission of such evidence is constitutionally required. *See Generally*: Annotation: *Admissibility in Rape Case, Under Rule 412 of Federal Rules of Evidence, of Evidence of Victim's Past Sexual Behavior*, 65 ALR Fed 519 (1983).

It is equally clear that the application of the rape-shield statute to limit the cross-examination of the complaining witness in the case at bar did not violate Peitioner's Sixth Amendment right to confront his accuser. The rape-shield statute specifically provides for the admission of evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. Petitioner's counsel was allowed to question the complainant with regard to her prior sexual relations in order to determine whether there might have been an alternative source for the semen stain found on her pajamas. The trial court properly limited Petitioner's counsel to questions relevant to that inquiry.

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. *Alford* v *United States*, 282 US 687; 51 S Ct 218; 75 L Ed 624 (1931). This discretion applies to an *in camera* evidentiary hearing held to determine the admissibility of evidence of the complainant's sexual conduct. At such a hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy or humiliate sexual assault victims, and to guard against mere fishing expeditions. *People* v *Hackett; People* v *Paquette, supra.*

Limitation of cross-examination in accordance with section 750.520j does not run afoul of constitutional protections. As the Michigan Supreme Court noted in *People* v *Arenda, supra*:

> *The right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant issues.* It may bow to accommodate other legitimate interests in the criminal

> trial process, see *Mancusi, supra*, and other social interests, see *United States* v *Nixon*, 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974).
>
> 416 Mich 1, 8. (Emphasis added)

The trial court did not abuse its discretion and did not abridge Petitioner's right of confrontation by limiting the cross-examination of the complainant in this case. Since evidence of the complainant's prior sexual activities with third parties was only admissible under section 750.520j for the purpose of showing an alternative source of the semen stains found on her pajamas, the court properly limited the cross-examination to the question of whether she had engaged in sexual relations with a man at some time prior to August 6, 1981, while wearing those pajamas. Only those sexual activities could have been the source of the semen stains. It is clear, therefore, that only those sexual activities could have been admissible under section 750.520j. The trial court properly foreclosed further inquiry after the witness had unequivocally denied that any such sexual activities had taken place.

For all of the foregoing reasons, the Respondent suggests that the trial court properly limited the scope of the cross-examination concerning the complainant's prior sexual activities. Since the record discloses no abuse of the trial court's discretion in this regard, the Respondent submits that Petitioner's conviction was properly affirmed by the Michigan Court of Appeals, and that the Michigan Supreme Court properly denied Petitioner's application for leave to appeal.

The Petitioner has also suggested, in his statement of the case, that the trial court improperly limited his

counsel's closing argument concerning other possible sources of the semen stain found on the complainant's pajamas.[3] An examination of the relevant portion of the record in its entirety demonstrates that this claim is also lacking in merit.

As is noted above in the statement of the case, Petitioner's counsel argued at length concerning the semen stain and the serological testing which was performed. (T, 7/29/82, 113-116) That argument is set forth in its entirety in the Respondent's statement of the case. The prosecutor did not object until Petitioner's counsel made the following statement:

> It could have come from anybody else in that neighborhood and although we can't talk about specifics or name names, certainly that's I think the conclusion that you are free to draw.
>
> (T, 7/29/82, 116)

The Respondent contends that the trial court properly sustained the prosecutor's objection, since this statement impermissibly suggested to the jurors that evidence did in fact exist which would have proven that the semen stain resulted from sexual relations with another man, and that the presentation of that evidence had been precluded. As is noted above, no showing was ever made to the trial court, by offer of proof or otherwise, that any such evidence, admissible under MCLA 750.520j, actually existed. Thus, it appears that this statement had the effect of accomplishing indirectly what could not be accomplished directly. The jurors were invited to specu-

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[3] Because the Petitioner has injected this claim in his statement of the case, the Respondent shall respond to it briefly, even though it has not been mentioned in the statement of the question presented or the argument portion of the petition.

late that the stain had indeed resulted from sexual relations with another man, even though no evidence had been presented on the subject. As a result, this portion of counsel's argument created a substantial danger that the jury might render a verdict based not upon the evidence, but upon prejudice. The Respondent contends, therefore, that the trial court porperly exercised its duty under MCLA 768.29[4] to limit that portion of counsel's argument.

A review of the relevant portion of the record demonstrates that the limitation placed upon counsel's argument did not preclude him from making his point that the semen stain could have come from another man. Petitioner's counsel was permitted to argue at length about the stain and the inconclusive nature of the serological testing. For example, Petitioner's counsel was permitted to argue, without objection, that a majority of the men in the United States could have been the contributor of the stain. (T, 7/29/82, 115) After reviewing counsel's argument in its entirety, it is impossible to conclude that the jury could have missed his point. The trial court's ruling served only to exclude the portion of counsel's argument which was improper. The Court of Appeals properly determined that the trial court did not abuse its discretion in this regard.

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[4] MCLA 768.29 provides that:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.

The Respondent contends, for all of the foregoing reasons, that the trial court did not abuse its discretion or deny Petitioner his Sixth Amendment right of confrontation by limiting the cross-examination of the complainant with regard to her prior sexual relations with third parties. Under the circumstances of this case, Petitioner's conviction was properly affirmed. The Petitioner has failed to demonstrate that the Michigan rape-shield statute is invalid, as violative of the Sixth Amendment right of confrontation, either on its face, or as applied in the case at bar. The Petitioner has not cited any discrepancy between the Michigan rape-shield statute and statutory or case law from other states or from the federal courts. The Petitioner seeks only to review the trial court's exercise of discretion in limiting the scope of cross-examination. The Respondent submits that this issue has been properly decided by the state courts, and that further review of that issue by this Court is therefore unwarranted. Accordingly, the Respondent respectfully suggests that the Petition for Writ of Certiorari filed herein should be denied.

CONCLUSION AND PRAYER FOR RELIEF

In view of the foregoing, the Respondent prays that this Honorable Court issue an order denying Petitioner's Petition for Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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DATED: February 19, 1985